No. 15404

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. J. KAHN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California, adjudging the appellant to be guilty of four counts of an information charging him with (Count I) failure to pay the occupational tax on wagering as imposed by Section 3290 of the Internal Revenue Code of 1939, and with (Counts II, IV, and V) failure to pay the excise tax on wagers as provided in Section 3285 of the Internal Revenue Code of 1939. [Tr. pp. 3-6, 326, 26-28.]

The violations are alleged to have been incurred in Los Angeles County, California, within the Central Division of the Southern District of California, in that appellant is alleged to have been required by law to pay said taxes to the District Director of Internal Revenue at Los Angeles, California. [Tr. pp. 3-6.]

The jurisdiction of the District Court was based upon Section 3231 of Title 18, United States Code. This Court has jurisdiction to entertain this appeal and to review the judgment in question under the provisions of Sections 1291 and 1294 of Title 28, United States Code.

Statement of the Case.

The appellant was convicted in the United States District Court for the Southern District of California, on four counts of an information filed in said District Court on November 17, 1955. [Tr. pp. 6, 326, 26-28.] Trial by jury was waived [Tr. p. 15] and trial was by the court, the Honorable William M. Byrne, United States District Judge, judge presiding.

The information was in five counts. The court found the defendant not guilty of Count Three. [Tr. p. 326.] Count One charged that during the tax year beginning July 1, 1953, and ending June 30, 1954, the appellant in San Diego County, California, engaged in the business of accepting wagers with respect to horse races, etc., and by reason of such activity he was required by law to pay the occupational tax on wagering as imposed by Section 3290 of the Internal Revenue Code of 1939, to the District Director of Internal Revenue in Los Angeles, California, and that well knowing those facts, the appellant wilfully and knowingly failed to pay said tax. Counts Two, Four, and Five, charge that during the months of September, 1953, December, 1953, and March, 1954, respectively, the appellant, in San Diego County, California, engaged in the business of accepting wagers with respect to horse races, in specific amounts as alleged in each Count, upon which wagers there was due and owing to the United States of America an excise tax on wagers as provided

in Section 3285 of the Internal Revenue Code of 1939, in specific amounts alleged in each Count, which he was required by law to pay to the District Director of Internal Revenue, at Los Angeles, California, and that well knowing those facts the appellant wilfully and knowingly failed to pay said tax. [Tr. pp. 3-6.]

The offense charged in Count One of the Information is an alleged violation of the statutory requirement (Sec. 3290, I. R. C. of 1939) that a person *who is engaged in the business of* accepting wagers shall pay a special tax of $50.00 per year. This is an occupational tax.

The offenses charged in Counts Two, Four and Five of the Information are alleged violations of the statutory provision (Sec. 3285, I. R. C. of 1939) imposing an excise tax, equal to 10 per centum of the amount thereof, on wagers accepted by persons who are *engaged in the business of accepting wagers.*

Both of the above offenses are misdemeanors.

The appellant filed a Motion for Bill of Particulars [Tr. pp. 8-10] and on January 16, 1956, the District Court granted that motion in part. [Tr. pp. 10-11.] Thereafter appellee filed its Bill of Particulars [Tr. pp. 11-13] which specified that the wagers alleged in Counts Two through Five were placed with the "defendant" by Eddie Qualin and Hubert Ursich, and went on to specify the dates and the amounts of the wagers.

At the close of evidence offered by the government [Tr. p. 187] appellant moved the Court, pursuant to Rule 29, Federal Rules of Criminal Procedure, for a Judgment of Acquittal. The motion was denied. [Tr. p. 193.] Appellant renewed his said motion at the conclusion of appellant's case and at the close of all the evi-

dence. [Tr. pp. 312, 319.] The motion was again denied. [Tr. p. 313.]

The Court found appellant guilty of Counts One, Two, Four and Five [Tr. p. 326] and not guilty of Count Three. [Tr. p. 326.]

At the close of the evidence the appellant requested the Court to find the facts specially under Rule 23 of the Federal Rules of Criminal Procedure [Tr. p. 326]; Special Findings of Fact were made and filed on September 20, 1956. [Tr. pp. 22-24.] On October 1, 1956, the Court sentenced appellant to pay a fine of $10,000.00 on Count One of the Information, and committed appellant to the custody of the Attorney General for a period of one year on each of Counts 2, 4 and 5, to run concurrently, execution suspended, probation granted for a period of 3 years on condition defendant pay the fine assessed on Count 1 on or before December 1, 1956. [Tr. pp. 26-27.]

Notice of Appeal was duly filed on October 9, 1956. [Tr. pp. 28-30.] On November 28, 1956, the District Court made and filed its Order, staying the sentence of payment of fine pending appeal and specifying the terms therefor [Tr. pp. 34-35], and on November 29, 1956, pursuant to said Order, the appellant filed his bond for the payment of said fine with the Clerk of the District Court. [Tr. pp. 35-36.]

The appellant is at liberty pursuant to the terms of the judgment and commitment.

The Statutes Involved.

The pertinent portions of the statutes involved are as follows:

Section 3290, Internal Revenue Code of 1939:

> "A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable."

Section 3285, Internal Revenue Code of 1939:

> "(a) Wagers. There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.
>
> * * * * * * * *
>
> "(d) Persons liable for tax. Each person who is *engaged in the business* of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. . . . (Emphasis added.)
>
> "(e) Exclusions from tax. No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 3267."

Statement of Facts.

Preliminary Statement.

At the outset, appellant wishes to state that he recognizes that on appeal this Court will take that view of the evidence which is most favorable to the appellee and will not review questions of fact which have been decided by the trial court if and when there is any substantial evidence to support them. Although appellant will not question the correctness of the rulings of the trial court admitting into evidence numerous of the checks which were offered as government's exhibits, appellant does not thereby concede that such checks should have been admitted nor does he concede, except for the purposes of this brief, the truth of the testimony which served as the foundation for the admission into evidence of those checks. There are only one or two exceptions to this position, which are specifically noted below.

It is appellant's position that, even if all of the evidence before the trial court is assumed to be true and correct, and properly admitted, that evidence does not support a conviction of the offenses charged.

The Setting of the Case.

The appellant, A. J. Kahn, is a man of 64 years who has lived in San Diego, California, for about 34 years. At the time of the alleged offenses, 1953-1954, he was actively engaged in business as the ". . . manager of about five or six clubs, family enterprises." [Tr. pp. 281, 199, 210, 236.] They were a chain of restaurants

and bars in San Diego. [Tr. p. 281.] His duties consisted primarily of doing all of the buying for all six of those clubs and commissaries, of hiring most of the help, and acting in a supervisory capacity of all of them. [Tr. pp. 282, 198, 199.] One of these businesses was known as the Club Royal, located at the corner of 3rd & "C" Streets in San Diego. [Tr. pp. 41, 281ff.]

Third Street, at that particular place, is an area having a large number of bars; in fact, in that block, except for one card room [Tr. p. 284] and one eating place, there are nothing but bars. [Tr. pp. 218-219.]

The government's principal witness, Hubert Ursich, was the captain of a fishing boat [Tr. pp. 76, 84] who at times made substantial money. [Tr. p. 100.] Ursich and appellant, A. J. Kahn, had been friends for several years [Tr. pp. 282, 291, 299]; estimated by Ursich at 8 or 9 years. [Tr. pp. 40-41, 82.] They remained friends until March of 1954 [Tr. pp. 82, 84, 122, 292, 296, 302, 306-309] when a disagreement arose between them.

As a result of that disagreement Ursich voluntarily went to the Internal Revenue Service [Tr. pp. 124, 132, 136, 147], within a month [Tr. p. 124], and formally complained that appellant was engaging in bookmaking in violation of the statutory provisions under which this prosecution was had; that act precipitated the investigation which led to this prosecution.

Appellant Kahn had also been acquainted for a number of years with the government's other witness, Qualin

[Tr. pp. 140, 146], another fisherman [Tr. p. 144], who was a friend of Ursich. [Tr. p. 144.] An animosity had also developed between Qualin and appellant. [Tr. p. 150.]

Ursich, when in from the sea, frequented and "hung out" at Club Royal a great deal [Tr. pp. 94, 126-129, 182-184, 200-203] and was considered to be a good spender. [Tr. pp. 206, 209, 270-271, 284, 291, 298.]

The area of 3rd and "C" Streets in San Diego was frequented by bookmakers and was known as the place where,

> ". . . if you want a little action in horse racing, that is where everybody hangs out.
>
> Q. You mean not just the Club Royal. A. No, Sir.
>
> Q. But in the whole row, is that right? A. In fact, you can't get by the corner without running into somebody with a sheet." [Tr. pp. 218-219.]

The bookmakers in the area also came into the Club Royal and were frequently soliciting bets from the patrons at the bar. [Tr. pp. 81-82, 126-129, 130, 180, 181, 199-200, 206, 209, 216-219.]

The management of Club Royal tried to run the bookmakers out from time to time but they were unsuccessful.

> ". . . and, of course, they were very good customers, and we just got to tolerate them a lot." [Tr. pp. 297-298, 181.]

As a part of his business policy appellant accommodated his customers by cashing their checks for them [Tr. pp.

182, 209-218, 256-259]; witness Ursich cashed numerous checks in that manner. [Tr. pp. 95, 182-183, 200-203, 206, 232-233, 249, 262, 269-271, 285, 286, 299-300.]

While frequenting Club Royal Ursich place many bets on horse races with the various bookmakers who "worked" the Club. [Tr. pp. 81-83, 126-130, 181, 200-203, 206, 209, 234, 285, 291, 297, 298.] Ursich himself, the government's witness, testified that sometimes you could see five or six bookmakers there at a given time. [Tr. p. 130.]

The Scope of the Evidence.

In its Bill of Particulars the government stated that the wagers alleged in Counts Two through Five were placed with the appellant by Eddie Qualin and Hubert Ursich. [Tr. p. 11.] The evidence produced by the prosecution consisted of testimony and of cancelled checks relating to purported wagers by said Qualin and said Ursich and was intended to prove the specific wagers of Counts Two through Five as set forth in the Bill of Particulars.

It is evident that the appellee's evidence in support of Counts Two, Four and Five was also considered as supporting Count One, viz., that appellant was a person who was "engaged in the business" of accepting wagers. There was no other evidence to support the charge. Therefore, the facts will be briefly reviewed as they apply to each of Counts Two, Four and Five, for, unless those facts support the conviction on Count One, it will fail.

The Facts as to Count Two.

On direct examination Hubert Ursich identified the cancelled checks which became the plaintiff's exhibits listed below and testified, in substance, that he had given them to appellant as horse race bets during September, 1953. All were payable to "cash."

Exhibit No.	Date	Amount	Transcript Reference
1	Sept. 4, 1953	$ 50.00	44, 47
2	9-8-53	120.00	45-47
3	9-16-53	300.00	46-47
4	9-22-53	400.00	47
5	9-22-53	50.00	48
6	9-22-53	50.00	49-50
7	9-23-53	100.00	50
7 Wagers 5 days		$1,070.00	

In addition, Eddie Qualin testified that on the Saturday before Labor Day, 1953 (September 5, 1953), at Del Mar Race Track [Tr. p. 140], he placed three bets of $300 apiece. [Tr. p. 141.] He didn't place the bets at the parimutuel window because he was a fisherman and ". . . we hadn't unloaded, we couldn't get paid yet . . .," so he approached Mr. Kahn and asked him to take his "action," ". . . a bet at the race track." [Tr. p. 141.] The bet was actually placed at Del Mar race track. [Tr. p. 140, near bottom.]

If this latter testimony is considered proof of wagers "accepted" by appellant the outer limits of the evidence establish a total of 10 wagers, with two people, in 6 days, grossing $1,970.00, during the month of September, 1953.

If the latter testimony does not amount to proof of wagers "accepted" by appellant, the outer limits of the evidence establish only 7 wagers, with one man, in 5 days, grossing $1,070.00, during the month of September, 1953.

The Facts as to Count Four.

On direct examination Hubert Ursich identified the cancelled checks, which became the plaintiff's exhibits listed below, and testified, in substance, that he had given them to appellant as horse race bets during December, 1953. All were payable to "cash."

Exhibit No.	Date	Amount	Transcript Reference
10	12-1-53	$ 50.00	53
11	12-5-53	100.00	54
12	12-11-53	100.00	54
13	12-11-53	200.00	56
14	12-14-53	400.00	56
15	12-14-53	400.00	57
16	12-14-53	100.00	58
7 Wagers	4 days	$1,350.00	

The outer limits of this evidence establish that during the month of December, 1953, appellant made a total of 7 wagers in 4 days, with one man, grossing $1,350.00.

The Evidence as to Count Five.

On direct examination Hubert Ursich identified the cancelled checks which became the plaintiff's exhibits listed below and testified, in substance, that he had given

them to appellant as horse race bets during March, 1954. All were payable to "cash."

Exhibit Number	Date	Amount	Transcript Reference
18	3-1954	$200.00	59
19	3-4-54	100.00	59-60
20	3-4-54	100.00	60
21	3-5-54	200.00	60
22	3-6-54	290.00	61
23	3-6-54	260.00	61
24	3-9-54	220.00	62
25	3-11-54	200.00	62
26	3-12-54	100.00	63
29	3-17-54	1000.00	64-65
30*	3-18-54*	460.00*	65-66
31	3-18-54	480.00	66
12 wagers	9 days	$3610.00	

If we are to accept all of the above exhibits, then the outer limits of this evidence establish that during the month of March, 1954, appellant made a total of 12 wagers, on 9 days, with 1 man, for a gross of $3,610.00; if we eliminate No. 30 there are only 11 wagers for a gross of $3,150.00.

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*As to Exhibit 30, above, after testifying on direct examination that this was a horse race bet with appellant [Tr. pp. 65-66], Witness Ursich testified on cross-examination [Tr. p. 114], as follows:

"Q. Now, the next exhibit is No. 30, I believe, Exhibit No. 30, and that is a check for $460 to 'Cash', and it is endorsed on the back 'A E. Anderson.' It is dated March 18, 1954. Is that one of the checks Mr. Anderson brought you the cash back on? A. As long as it is Mr. Anderson's signature alone, I take exception to that check.

Q. You mean you retract what you previously said? A. I retract what I said about that check."

The Facts as to Count One.

As mentioned above, the evidence supporting the excise tax violations charged in Counts Two, Four and Five must necessarily be considered as supporting the occupational tax violation charged in Count One or it must fail. There is no other evidence.

Summary of Evidence.

Count	Wagers	Gross Amount	No. of Men Involved
II	7 or 10	$1,070 or $1,970	All to
IV	7 7	$1,350 $1,350	one or
V	11 or 12	$3,150 or $3,610	two men.
Total for year	25 or 29	$5,570 $6,930	

Specifications of Error.

I.

The District Court erred in denying appellant's motion for judgment of acquittal at the close of the evidence offered by the Government.

II.

The District Court erred in denying appellant's motion for judgment of acquittal at the close of all the evidence.

III.

The evidence is not sufficient to support and sustain the Special Findings of Fact.

IV.

The Special Findings of Fact are not sufficient to support and sustain the general finding of "guilty" of the offenses charged in Counts I, II, IV, and V of the Information in the above-entitled criminal proceedings.

V.

The evidence is not sufficient to support and sustain the judgment of conviction of the offenses charged in Counts I, II, IV, and V of the Information in the above-entitled criminal proceedings.

ARGUMENT.

Preliminary Statement.

Appellant recognizes that the above Specifications of Error are, in practical effect, different ways of stating the same fundamental error by the District Court and that to establish one is, in effect, to establish each of the others. Their common denominator, and the fundamental error of the District Court, is that the evidence of the prosecution, taken at full face value, does not support a conviction of the offenses charged. For that reason appellant submits the following argument in support of each of his Specifications of Error.

I.

The Evidence Is Not Sufficient to Support and Sustain the Judgment of Conviction of the Offenses Charged in Counts One, Two, Four and Five of the Information.

Liability for the Tax.

In Count One of the Information appellant was charged with failure to pay the occupational tax on wagering imposed by Section 3290 of the Internal Revenue Code of 1939, and in Counts Two, Four and Five he was charged with failure to pay the excise tax on wages imposed by Section 3285 of the Internal Revenue Code of 1939. By its own terms Section 3290 imposes the liability to pay the occupational tax only on those who are liable to pay the excise tax under Section 3285, or on those who are ". . . engaged in receiving wages for or on behalf of any persons so liable." There was nothing in the evidence to indicate that appellant was engaged in receiving wagers ". . . for or on behalf of any person so liable." The wagers assumed to be established by the evidence were clearly wagers between the appellant,

on the one hand, and Ursich or Qualin on the other. Thus, to bring appellant into the definition of those who are liable to pay the occupational tax it is necessary to show that he is one of those who are liable to pay the excise tax imposed by Section 3285.

Section 3285 defines those persons who are liable to pay the excise tax as follows:

> "'(d) Persons liable for tax. Each person who is engaged in the *business of accepting wagers* shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. . . ." (Emphasis added.)

Appellant submits that it is significant that the Congress used the phrase ". . . who is engaged in the business of accepting wages . . ." in defining those persons who are liable to pay the tax. It is appellant's position that he was not so engaged at the time of the offenses charged and that he has never, at any time, been so engaged.

There are few decisions interpreting the above definition of who is liable to pay the tax. A series of three cases touching upon the subject, but not clearly defining the phrase, came out of the Fifth Circuit in 1955.

In *Hodges v. United States* (5 Cir., 1955), 223 F. 2d 140, the appellant was convicted of failure to pay the occupational tax required by Section 3290 and his conviction was affirmed on appeal. In that case there was proof of appellant's participation in only two transactions involving commercialized wagering but the evidence established that he had received the wagers on each occasion "for or on behalf" of persons who truly were engaged in the business of accepting wagers, commercialized gambling, and that, of course, he did so knowingly.

"Therefore, we are of the opinion that in imposing taxes upon *commercialized gambling,* the Congress intended that the 'occupational' tax be paid not only by those operating such businesses, but also by anyone who knowingly received wagers on behalf of such persons. When appellant knowingly received Thompson's bets for King, he voluntarily became King's agent and placed himself within that class of persons against whom the Congress assessed the special tax." (Emphasis added.)

Hodges v. United States (5 Cir, 1955), 223 F. 2d 140, 143.

On the same date the same Court handed down another similar decision holding that the employee or runner of a person engaged in accepting wagers would have to pay the special tax imposed by Section 3290. In *Sagonias v. United States,* the Court of Appeals for the Fifth Circuit held:

"As we pointed out in the Hodges case, the primary purpose of the statute as a whole was to produce revenue by subjecting *commercialized gambling* to taxation. Its provisions clearly indicate that the special tax applies to the principal or proprietor and all persons who were knowingly engaged or used by him to receive wagers. While the express wording of Section 3290 does not include other employees directly involved in the operation, we think it would be inconsistent with the purpose of the statute to tax those who physically receive the wagers and exempt those whose duties were as important and as much a necessary part of the gambling operation." (Emphasis added.)

Sagonias v. United States (5 Cir., 1955), 223 F. 2d 146, 147.

The same court handed down a third decision on the same date holding that the occupational tax had to be paid by a person engaged in receiving wagers for or on behalf of a person engaged in the business of accepting wagers.

> ". . . [T]he criminal sanctions for engaging in the occupation of accepting wagers without payment of the special tax apply likewise to engaging in receiving wagers for or on behalf of a person in that occupation; and the jury could properly infer that Cagnina did acts in the latter category."
>
> *Cagnina v. United States* (5 Cir., 1955), 223 F. 2d 149, 151.

None of the above cases supports the position which the appellee must support in the case at bar, namely, that the wagers proved between appellant and Ursich, and between appellant and Qualin, if any, wagers which were purely friendly wagers, were such as to place appellant in the category of a person "engaged in the business" of accepting wagers. Nor is there any evidence indicating that appellant accepted such wagers *"for or on behalf of"* any person who was engaged in the business of accepting wagers.

It is apparent from the above decisions that the Fifth Circuit has recognized, as properly it should, that the wagering tax laws are directed at the taxation of *commercialized* gambling. See the cited portions from *Hodges v. United States* and from *Sagonias v. United States,* set forth above.

The underlying fact that the laws in question are intended to apply only to *commercialized* gambling, and are definitely not to apply to the friendly or social type

of "bet," is stated in precisely so many words in the Congressional Reports for the Revenue Act of 1951, which included the statutory provisions in question.

In commenting on the proposed taxes on gambling the House Report provided:

> "Commercialized gambling holds the unique position of being a multibillion dollar, Nation-wide business that has remained comparatively free from taxation by either State or Federal Governments. This relative immunity from taxation has persisted in spite of the fact that wagering has many characteristics which made it particularly suitable as a subject for taxation. Your committee is convinced that the continuance of this immunity is inconsistent with the present need for increased revenue, especially at a time when many consumer items of a seminecessity nature are being called upon to bear new or additional tax burdens.
>
> * * * * * * * *
>
> "Wagers on sports events or contests, to be taxable, must be placed with a person *engaged in the business* of accepting such wagers. *The purpose of this requirement is to exclude from tax the purely 'social' or 'friendly' type of bet.*" (Emphasis added.)
>
> U. S. Code Cong. Service, 1st Sess., 82nd Cong., 1951, House Report, pp. 1838-1839. See also Senate Report, pp. 2090-2091.

There are as yet no reported decisions clearly defining the difference between the "social or friendly" type of bet and what the Congressional committees and the Fifth Circuit have defined as "commercialized gambling." The cases reported from the Fifth Circuit deal with what is clearly commercialized gambling. Of little help is the

decision of the United States District Court for the District of Rhode Island, commenting that ". . . the acceptance of a single wager does not make the acceptor subject to this tax, or subject to a penalty for not paying the tax . . ."

United States v. Forys, D. C. R. I. 1953, 113 Fed. Supp. 580, 582.

What Is "Commercialized" Gambling?

From the House and Senate committee reports, quoted above, it is clearly apparent that the statutes of which appellant now stands convicted were intended by the Congress to impose an excise tax on the proceeds of *commercialized gambling* and to impose a special occupational tax on all persons who were liable to pay the excise tax on commercialized gambling, namely, persons who are "engaged in the business of accepting wagers."

The reported decisions of the Fifth Circuit cited above confirm that the statutes in question and the taxes in question were intended to apply only to commercialized gambling and the persons who are engaged in that business. It is to be noted that the House and Senate reports include the statement that "commercialized gambling holds the unique position of being a multibillion dollar nationwide business. . . ."

It is also clear from the House and Senate committee reports and from the provisions of the law that neither the excise tax nor the occupational tax should apply to "the purely social or friendly type of bet" nor to those persons who indulge themselves in such bets.

The decisions reported to date, construing the specific laws in question, confirm this position but they do not provide us with a definition of just what is "commercialized gambling."

Appellant submits that in our search for the definition of "commercialized gambling" the Congress has provided us with a guide when it has decreed that the persons liable for the tax are those persons who are *"engaged in the business" of accepting wagers.* Section 3285(d) Internal Revenue Code 1939 provides as follows:

> "(d) Persons liable for tax. Each person who is *engaged in the business* of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. . . ." (Emphasis added.)

The Meaning of "Engaged in Business."

The statutes which the appellant has been convicted of violating are provisions of the Internal Revenue Code and are designed to impose a tax on the "multibillion dollar nation-wide business" of commercialized gambling. The statute imposes two taxes: one an excise tax upon the amount of the wagers, and the other a special occupational tax upon the persons who are engaged in the business of accepting such wagers. Purely social or friendly types of bets are specifically excluded in the language of the Congressional Reports and by necessary implication are excluded in the statutes.

The language used in Section 3285(d) has a clear, definite and well established meaning in our laws in the decisions of our courts and in everyday usage. The term "business" as used in the Internal Revenue Code was first defined by the Supreme Court of the United States in *Flint v. Stone Tracy Co.* (1910), 220 U. S. 107, 171, 55 L. Ed. 389, 421, as follows:

> "'Business' is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict. 158, citing People ex rel.

> Hoyt v. Tax Comrs. 23 N. Y. 242, 244. 'That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit.' 1 Bouvier's Law Dict. p. 273."

That definition by the Supreme Court was later repeated, affirmed and enlarged by the Supreme Court of the United States in *Von Baumbach v. Sargent Land Co.* (1916), 242 U. S. 503, 514, 61 L. Ed. 460, 467, as follows:

> "Were the respondents carrying on business, within the meaning of the Corporation Tax Act? This question was dealt with by this court in the first of the Corporation Tax Cases, Flint v. Stone Tracy Co., 220 U. S. 107, 55 L. ed 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312. As the tax was there held to be assessed upon the privilege of doing business in a corporate capacity, it became necessary to inquire what it was to do business, and this court adopted with approval the definition judicially approved in other cases, which included within the comprehensive term 'business' 'that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit.' "

The above definition of "business" has been adopted by the United States Court of Appeals for the 9th Circuit and has been quoted and referred to in numerous of the decisions of this Court. Among them the appellant respectfully invites the attention of the Court to the following:

> *Richards v. Commissioner* (9th Cir., 1936), 81 F. 2d 369, 371-372;
>
> *Section Seven Corp. v. Anglim* (9th Cir., 1943), 136 F. 2d 155, 157-158;

San Fernando M. Land Co. v. Commissioner (9th Cir., 1943), 135 F. 2d 547, 549;

United States v. Hercules Mining Co. (9th Cir., 1941), 119 F. 2d 289, 290-291.

The same rule is established in each of the other Circuits. Representative cases are as follows:

Foss v. Commissioner (1st Cir., 1935), 75 F. 2d 326, 327;

United States v. Warren R. Co. (2nd Cir., 1942), 127 F. 2d 134, 137;

Helvering v. Wilmington Trust Co. (3rd Cir., 1941), 124 F. 2d 156, 158;

Harrisburg Hotel Co. v. United States (3rd Cir., 1944), 145 F. 2d 116, 118;

Cecil v. Commissioner (4th Cir., 1939), 100 F. 2d 896, 898;

Burk v. United States (5th Cir., 1943), 134 F. 2d 879, 881;

Dunlap v. Oldham Lbr. Co. (5th Cir., 1950), 178 F. 2d 781, 784;

Employers Liability, etc. Co. v. Accident Casualty Co., etc. (6th Cir., 1943), 134 F. 2d 566, 568;

Kales v. Commissioner (6th Cir., 1939), 101 F. 2d 35, 37;

Roseland v. Phister Mfg. Co. (7th Cir., 1942), 125 F. 2d 417, 419, 139 A. L. R. 1013;

Walker v. United States (8th Cir., 1937), 93 F. 2d 383, 391;

Kelley v. United States (10th Cir., 1953), 202 F. 2d 838, 841;

Hazen v. National Rifle Ass'n., (App. D. C., 1938), 101 F. 2d 432, 437-438.

The same rule is established and binding in the Courts of the State of California. For example:

Union League Club v. Johnson (1941), 18 Cal. 2d 275;

City of Los Angeles v. Cohen (1954), 124 Cal. App. 2d 225, 288, 268 P. 2d 183;

Mansfield v. Hyde (1952), 112 Cal. App. 2d 133, 137-138, 245 P. 2d 577.

See also:

12 C. J. S. p. 767 and cases collected there.

The phrase defining the persons subject to the tax, "engaged in the business", likewise has a clearly established meaning in the law. In addition to the significance derived from the word "business" the words "engaged in" add the additional requirement that the particular activity referred to be one characterized by an element of continuity or habitual practice. It has been established that the words "engaged in" eliminate those instances in which the activity is disconnected or in which there are very few instances of the activity. In this connection, see *Supreme Malt Products Co. v. United States* (1st Cir. 1946), 153 F. 2d 5, 6 and also see those cases collected at 14A Words & Phrases, p. 188 *et seq.*

In view of the foregoing it is interesting to consider the evidence against this appellant against the background of what the courts have established to be necessary before one is "engaged in a business."

In the first place the decisions establish that a "business" requires as an element that it be an activity engaged in for the purpose of making a livelihood or a profit. In the case at bar it has been established that the appellant, a

man of 64 years, is and for many years has been actively employed as the supervising manager of numerous clubs, restaurants and bars and that at the time of the alleged offenses he was actively engaged in operating six such clubs and restaurants. Indeed, one of the witnesses testified [Tr. p. 199] that at the time Mr. Kahn was supervising 5 or 6 night clubs or bars in the neighborhood and that he was gone from (the Club Royal) more than he was there. Since the alleged wagering activity complained of took place at the Club Royal we submit that this fact is not consistent with the appellant's being engaged in the business of accepting wagers.

Of equal importance, we submit, is the fact that although the Information covered the tax year from July 1, 1953, through June 30, 1954, the Government's evidence, taken at face value, is intended to establish wagering between the appellant and only one man, Hubert Ursich, unless it is conceded that the alleged bets of September 5, 1953, at Del Mar race track with witness Qualin are wagers, in which event there would be activity with 2 men. We submit that this fact is inconsistent with the appellant being engaged in the business of accepting wagers. If he were so engaged surely the Government would have produced evidence of a more substantial nature.

It is also interesting to note that, taken at face value, the government's evidence indicates a gross dollar volume of wagering for the tax year of $6930.00 or $5570.00, depending upon which interpretation of the facts is considered. Appellant submits that if he were engaged in the business of accepting wagers the government would have been able to produce more substantial evidence of a business activity.

Of probably greatest significance is the fact that the government's evidence has clearly established that during the time in question appellant's Club Royal and the surrounding area was a gathering place for the frequenters of card rooms and those who were interested in betting on the horse races and that although appellant tried to run the bookmakers out of his place from time to time without success he "tolerated them" and suffered them to carry on their calling within the Club Royal where, at times, there would be 5 or 6 or more bookmakers present soliciting bets from the patrons of the bar. This fact was established through the testimony of the government's witnesses as well as those of the defense. We submit that, if the appellant were "engaged in the business of accepting wagers," plain common business sense and judgment would require that he not permit his "competitors" to operate within his own place of business.

The Qualin Bets.

It has been set forth above that the purported wagers with witness Qualin took place at Del Mar race track on September 5, 1953. [Tr. pp. 140-146.] Witness Qualin said, at the bottom of page 140, that he actually placed the bet at Del Mar race track but that he did not place it at the parimutuel window because he had not yet been paid so he approached Mr. Kahn for the money.

Appellant submits that, assuming this is true, the wagers would be excluded from the provision of the tax by those provisions of Section 3285(e), which provides:

> "(e) Exclusions from the Tax. No tax shall be imposed by this subchapter, on any wager placed with, or on any wager placed in a wagering pool conducted by a parimutuel wagering enterprise . . ."

Conclusion.

Appellant respectfully submits that even though the evidence produced by the government at his trial and admitted by the Court be given its full face value, it does not support a conviction for the offenses charged in the Information. The tax laws which appellant is convicted of violating are intended to impose and do impose excise taxes upon wagers handled by persons who are "engaged in the business" of accepting wagers, but upon those wagers only; they also impose a special occupational tax upon those persons who are engaged in the business of accepting wagers, but upon those persons only. The purpose of those laws, as established by the Congressional committee reports and those decisions reported to date, is to impose the above mentioned taxes on commercialized gambling. The evidence before the trial court and upon which this appellant was convicted failed wholly to establish that at the time in question, or at any other time, this appellant was "a person engaged in the business of accepting wagers." Therefore, the evidence does not support the finding of guilty and we submit that the judgment of the District Court should be reversed.

Respectfully submitted,

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